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IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent,

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE ALLIANCE DEFENSE FUND, AS *AMICUS CURIAE*, SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of the Alliance Defense Fund.[1]

The **ALLIANCE DEFENSE FUND** ("ADF") is a not-for-profit legal alliance organization. The ADF has 820 affiliated allied attorneys. Also allied with the ADF are numerous public interest law firms and organizations. In addition to engaging in direct litigation, the ADF provides litigation funding and training to organizations and attorneys protecting religious civil liberties.

ADF has advocated for rights of Americans under the United States Constitution in numerous significant cases throughout the United States, having been directly or indirectly involved in over 900 cases, including 42 cases before the United States Supreme Court.

The ADF works to preserve and protect religious liberty. It has particular knowledge helpful to the Court in this case concerning the social and legal impact of the authoritative use of international law.

CONSENT TO FILE BRIEF

Petitioners and Respondents, through their counsel of record, consented to the filing of all Briefs *Amicus Curiae* in this case. Their confirmations of global consent are on file with the Clerk of the Court.

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[1] In accordance with Supreme Court Rule 37(6), *amicus* certifies that this brief was authored entirely by Counsel of Record for *amicus* and that no part of the brief was authored by any attorney for a party. No person or entity other than *amicus curiae* or its counsel provided a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court, in resolving the instant issues, should not use International Court of Justice (ICJ) judgments as authoritative interpretative sources.

The ICJ lacked jurisdictional authority to discern individual rights judicially enforceable in American courts. In addition to lacking authority to render its judgment, a substantial amount of legal authority suggests the ICJ incorrectly concluded the Treaty creates individual rights enforceable in American Courts. Furthermore, authoritatively adopting the ICJ judgments will create an irreconcilable conflict with existing federal statutes and well-established constitutional doctrines of criminal procedure.

By asking this Court to authoritatively use the ICJ judgments in interpreting the Treaty, Petitioners seek to legitimize holdings of that tribunal as the rule of decision for American courts. Given that the politically accountable branches of the American government hold a very different understanding of the Treaty's terms than the ICJ, heeding Petitioner's request is an especially inappropriate course for this Court.

To impose the ICJ's interpretation upon the United States subordinates and alters the United States Constitution. It deprives the Executive Branch of its right, under the U.N. Charter, to exercise discretion in choosing how to respond to a judgment of the ICJ. It also deprives Congress of its constitutional authority to legislate. By denying the politically accountable branches of this Nation the ability to carry out their respective roles under the Constitution, it surrenders sovereignty of the United States to an unelected

international body. Neither the United States Constitution, nor the natural law of nations on which it was founded, permit such an extraordinary result.

Amicus curiae, therefore, urges this Court, not to rely upon the *LaGrand* and *Avena* decisions as authoritative interpretative sources.

ARGUMENT

Amicus curiae discuss why this Court should not use International Court of Justice (ICJ) judgments as authoritative interpretative sources in resolving the instant issues.

THIS COURT SHOULD NOT RELY UPON JUDGMENTS OF THE INTERNATIONAL COURT OF JUSTICE

Petitioners suggest it is proper for this Court, in resolving whether the Vienna Convention creates judicially enforceable individual rights, to rely on judgments rendered by the ICJ. (Pet'r. Br. Bustillo i, 29-31; Sanchez-Llamas i, 26-28). Petitioners are wrong.

A. THE INTERNATIONAL COURT OF JUSTICE (ICJ) DECISIONS IN *LaGrande* AND *Avena* ARE NOT ENTITLED TO RECOGNITION AND ARE NOT CONTROLLING

The United Nations adopted the Vienna Convention on Consular Relations and Optional Protocols on April 24, 1963. Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, art. 36(2), 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention or "Treaty"]. The United States Senate ratified the Vienna Convention and the Optional Protocol concerning Compulsory Settlement of Disputes[2] on October 22, 1969. 115 Cong. Rec. 30,997 (1969).

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[2] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, art. 1, 21 U.S.T. 325, 596 U.N.T.S. 487, [hereinafter Optional Protocol].

This Court has stated that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court *with jurisdiction to interpret* [the treaty]" (emphasis added). *Breard v. Green*, 523 U.S. 371, 375 (1998). For the reasons discussed in this brief, however, the ICJ lacked jurisdictional authority to discern individual rights judicially enforceable in American courts. This Court should not, therefore, authoritatively use the *LaGrand* or *Avena* ICJ judgments as authoritative interpretative sources in resolving the instant issues.

In the *LaGrand* and *Avena* cases, signatory nations to the Vienna Convention brought actions against the United States in the International Court of Justice. Relying on the Optional Protocol for jurisdiction, the ICJ entered judgments ultimately holding that: (1) the Vienna Convention establishes individual rights for foreign nationals; (2) these individual rights are to be judicially enforced in American courts; and (3) American constitutional and statutory procedural default rules cannot bar judicial review of a foreign national's Vienna Convention Claim in American courts. *See Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 1 (Mar. 31); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27).

The ICJ in *Avena* made clear it intended its judgment to broadly apply as the rule of decision in all cases involving similarly situated foreign nationals in the United States. *Avena* at para. 151. The ICJ's position, and Petitioners' desire for this Court to adopt it in the instant case, must not stand. Given that the politically accountable branches of the American government hold a very different understanding of the Treaty's terms than the ICJ, heeding Petitioner's request is an especially inappropriate course for this Court.

1. The ICJ lacked authority under the Optional Protocol to discern individual rights judicially enforceable in American courts.

Petitioners contend the Optional Protocol to the Vienna Convention provided the ICJ with jurisdiction to discern individual rights and prescribe that such rights be judicially enforceable in American courts. (Pet'r. Br. Bustillo 31; Sanchez-Llamas 26-27). The Optional Protocol actually states much less, merely providing that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." (Optional Protocol).

Article 34 of the ICJ Statute provides that "[o]nly *states* may be parties in cases before the court." Statute of the International Court of Justice, 59 Stat. 1055 (emphasis added). Article 59 of the ICJ Statute further indicates that "the decision of the court has no binding force *except between the parties* and in respect to that particular case." *Id.* (emphasis added). Thus, the ICJ has no power to announce the existence of individual rights, and its judgments can have no effect on a dispute involving an individual.

Moreover, the text of the Optional Protocol negates Petitioners' view that the Optional Protocol empowered the ICJ to create judicially enforceable individual rights. In this regard, the text in Article I of the Optional Protocol only permits a signatory State to participate in a dispute before the ICJ. (Optional Protocol). This jurisdictional limitation expressly precludes individuals from asserting rights of their own, or in any way participating in a case before the ICJ. The ICJ certainly, therefore, lacked authority under the

Protocol to divine individual rights from the shadows of the Vienna Convention during such a proceeding.

Moreover, nothing credible in the record suggests that the President's negotiation and the Senate's ratification of the Optional Protocol included surrendering the sovereignty of the United States to the ICJ. To be sure, as long as the United States remained a party to the Protocol, the politically accountable branches agreed to permit the ICJ to hear "[d]isputes arising out of the interpretation or application of the Convention." *Id.* Nothing in this plain language, however, authorized the ICJ to create individual rights under the treaty, or prescribe that such rights be judicially enforceable in American courts. Likewise, nothing in the plain language of the Optional Protocol authorized the ICJ to broadly extend this ruling to all consular notification cases in the United States.

Furthermore, Article 94 of the United Nations Charter provides the basis of a signatory State's obligation to comply with a judgment of the ICJ – not the Optional Protocol. U.N. Charter art. 94, para. 1, 59 Stat. 1051. In this regard Article 94 provides that an individual member of the United Nations must "undertake[] to comply with the decision of the International Court of Justice in any case to which it is a party." *Id.* The position of the United States is that the words, *undertakes to comply*

> [do] not constitute an acknowledgment that an ICJ decision will have immediate legal effect in the courts of U.N. members. Instead, it constitutes a commitment on the part of the U.N. members to take future action through their political branches to comply with an ICJ decision. U.S. Br. as *Amicus Curiae* at 34,

Medellin v. Dretke, 125 S.Ct. 2088 (2005) (No. 04-5928).

Thus, the source for this Nation's obligation to comply with an ICJ judgment is the U.N. Charter; and under that Charter, the fulfillment of Article 36 Vienna Convention obligations rests with the politically accountable branches of the United States, not the judiciary.

Since the U.N. Charter by design lacks specificity as to how a signatory State should comply with a judgment by the ICJ, it is fair to infer that the Charter vested the politically accountable branches of a signatory State with discretion in deciding how the nation will comply. Moreover, under the U.N. Charter, enforcement of a signatory nation's obligation to comply falls to the U.N. Security Council, not the ICJ. U.N. Charter Art. 94, para. 2. Unilateral dictates by the ICJ requiring compliance through immediate judicial review by a signatory State, deprives the politically accountable branches of this Nation of the right to exercise discretion pursuant to the U.N. Charter. Indeed, as far as your *Amici* is aware, no existing signatory State understands Article 94 of the Charter as imposing a requirement of compliance through the signatory nation's judiciary, independent of the politically accountable branches of government. *See Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (holding that Article 94 of the U.N. Charter "does not confer rights on private individuals"). This is because Article 94 of the U.N. Charter envisaged situations where the politically accountable branches of a signatory State might exercise discretion not to comply with a judgment of the ICJ; in such a situation seeking remedial satisfaction in the UN Security Council is the only alternative. U.N. Charter Art. 94, para. 2

Thus, the ICJ's judgments calling for enforcement of a Treaty obligation, via immediate judicial review in the signatory state, are acutely inconsistent with the enforcement process in the U.N. Charter. Indeed, the ICJ's position unacceptably renders Article 94 of the U.N. Charter meaningless.

Enforcement of treaty provisions does not fall within the purview of international tribunals. This is because "[a] treaty is primarily a compact between independent nations." *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 598 (1884). Thus, a treaty depends "on the interest and honor of the governments which are parties to it" for enforcement. *Id.* In the *Avena* case, the President chose to comply with the ICJ's judgment "by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005). The President grounded his compliance not in any authority of the ICJ, but in the executive power of Article II of the United States Constitution. *Id.*

At the same time the President complied with the judgment in the *Avena* case, the President chose to protect the Nation from future judgments based on *Avena's* faulty legal principles. The President accomplished this purpose by withdrawing the United States from the Optional Protocol. *See* Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (March 7, 2005) (notifying the Secretary-General of the United States withdrawal from the Optional Protocol) [hereinafter *U.S. Letter of Rescission*].

The President's rescission from the Optional Protocol powerfully demonstrates Executive Branch intent not to

surrender sovereignty to an international tribunal (i.e., by subjecting itself to erroneous judgments improperly rendered without authority).

2. The ICJ Incorrectly Concluded that the Treaty Creates Individual Rights Judicially Enforceable in American Courts

In addition to lacking authority to render its judgment, significant support exists suggesting the ICJ was incorrect in concluding that the Treaty creates individual rights judicially enforceable in American Courts. To ascertain whether a treaty confers a right on individuals, this Court looks to the text of a treaty, just as it would with a statute. *U.S. v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). Thus, a court construing treaty provisions must do so in accordance with established rules of statutory construction. *Id.* In this regard, this Court looks to the plain language of the treaty. *Id.*

It is certainly questionable whether the ICJ, in reaching its conclusions, evaluated the plain language of the Treaty. If the purpose of the Treaty is, as the ICJ suggests, creation of judicially enforceable individual rights, then key portions of the Treaty's text are a meaningless nullity. For example, the Treaty Preamble plainly states that the purpose of the privileges and immunities in the Treaty is "[to] contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems . . . ." Vienna Convention, Preamble. Creating judicially enforceable individual rights out the shadows of the Treaty, has nothing to do with developing friendly relations among nations with very different systems. Neither does coercing such judicially enforceable individual rights on a signatory State. Indeed, the recent rescission of the United States as a signatory State to the Optional Protocol,

demonstrates just how incompatible the ICJ's position is with the actual purpose of facilitating diplomatic relations expressed in the text.

Moreover, the plain language of the Treaty Preamble goes on to expressly state "the purpose of such privileges and immunities *is not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *Id.* (emphasis added).

Article 36 is located in Chapter II of the Treaty and is entitled "Facilities, Privileges and Immunities Relating to Consular Posts." Vienna Convention, Chapter II.[3] Article 36 states the obligations of signatory nations relevant to Petitioners' claims in this case. On their face, those provisions relate to facilitating consular activity in receiving states and seem, therefore, to confirm the general purpose stated in the Preamble.[4] Significantly, Article 36 resides in

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[3] The title of Chapter II of the Treaty is: "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other members of a Consular Post." Vienna Convention, Chapter II.

[4] The pertinent part of Article 36 provides: 1. *With a view to facilitating the exercise of consular functions relating to nationals of the sending State*:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have

the section relating to consular posts, and not the section concerning facilities, privileges and immunities of individuals (i.e., members of the consular post) (compare Vienna Convention, Chapter II, sections I and II).

The ratification history of the Vienna Convention likewise corroborates the view that the Treaty did not create individual rights judicially enforceable in American courts. State Department testimony during ratification hearings provided that the Treaty "does not have the effect of overcoming federal or State law beyond the scope long authorized in existing consular conventions." *See U.S. v. Li*, 206 F.3d 56, 64 (1st Cir. 2000) (en banc) (referring to State Department statements).

During the ratification process, the State Department's testimony furthered emphasized that the Treaty's purpose was "not to benefit individuals." Sen. Doc Exec. E, 91st Cong. 1st Sess. (1969) (referring to the Treaty Preamble). When the Senate Committee on Foreign Relations transmitted the Treaty to the full Senate for ratification, the Committee Chair included a short report; this report indicated that the Committee believed that the Treaty "does not change or affect present U.S. laws or practice." *Id.*

Several federal circuits and state courts have concluded that the Vienna Convention does not create individual rights that a defendant may assert in a criminal proceeding. *See, e.g., U.S. v. Duarte-Acero*, 296 F.3d 1277,

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the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (emphasis added).

1281-82 (11th Cir.); *U.S. v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001); *U.S. v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001); *U.S. v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.); *Li*, 206 F.3d at 60-66 (1st Cir. 2000) (en banc); *see also Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002); *State v. Navarro*, 659 N.W.2d 487, 493 (Wis. Ct. App. 2002); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001).

Additionally, the President's removal of the United States, as a signatory State to the Optional Protocol, confirms the Executive Branch view that the Vienna Convention does not create individual rights judicially enforceable in American courts. Indeed, the Executive Branch "has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right." U.S. Brief as *Amicus Curiae* at 22-23, *Medellin v Dretke* 125 S.Ct. 2088 (2005) (No. 04-5928); U.S. Brief at 18-23, *Republic of Paraguay v. Gilmore*, 523 U.S. 1068 (1998) (No. 97-1390).

The State Department, in the *Li* case, advised that the Treaty established rights and obligations between signatory nations, not individual rights. *Li*, 206 F.3d at 63 (citing to State Department statements). Other State Department statements as early as 1970 provided that the Treaty would not require significant departures from existing practice. *Id.* at 64. Finally, the State Department expressly indicated that: "The [only] remedies for failures of consular notification under the [Vienna convention] are diplomatic, political, or exist between states under international law." *Id.* at 63. Because the President serves as the "sole organ of the federal government in the field of international relations," *U.S. v. Curtiss-Wright*, 299 U.S. 304, 320 (1936), this Court should give the Executive Branch's understanding of the Treaty in this case "great weight." *U.S. v. Stuart*, 489 U.S. 353, 369 (1989).

B. AUTHORITATIVELY ADOPTING THE ICJ JUDGMENT CREATES AN IRRECONCILABLE CONFLICT WITH EXISTING FEDERAL STATUTES AND WELL ESTABLISHED CONSTITUTIONAL DOCTRINES OF CRIMINAL PROCEDURE

The ICJ decision creating individual rights, and prescribing judicial enforcement of such rights in American courts, failed to consider the federal nature of our Nation's constitutional structure. The Constitution's Supremacy Clause provides:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made*, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (emphasis added).

Petitioner Bustillo contends that ICJ's version of the Treaty is the Supreme Law of the Land. (Pet'r. Bustillo Brief at 16-20, 29-31, 45). Citing the Supremacy Clause, he argues the ICJ's version of the Treaty (creating judicially enforceable rights without regard to procedural default rules) must prevail over a state habeas statute barring claims, if not first raised in the state trial court. *Id.* Adopting the ICJ judgment as the authoritative "rule of decision" in state habeas cases, however, would create an irreconcilable conflict with existing federal habeas statutes and firmly fixed constitutional doctrines of criminal procedure involving procedural default. It is this irreconcilable conflict to which we now turn.

"[A]bsent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard,* 523 U.S. at 375 (1998) (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988)); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); and *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539 (1987)).

Indeed, "the Vienna Convention itself" permits and embodies American state and federal law's procedural default principle by expressly providing that Convention rights "'shall be exercised in conformity with the laws and regulations of the receiving State'" so long as "'said laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'" *Breard,* 523 U.S. at 375 (citing and quoting Vienna Convention, *supra*, 21 U.S.T. at 101).

In *Breard v. Greene,* this Court held that the procedural default rules, developed under the United States Constitution, accomplish those purposes–and that Vienna Convention claims, like Constitutional claims, can be procedurally defaulted. 523 U.S. at 375. The now axiomatic rule developed by this Court under the United States Constitution is that claims of error in criminal proceedings "must first be raised in state court in order to form the basis for relief in habeas," whether in capital or other cases. *Breard*, 532 U.S. at 375 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).[5]

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[5] Several federal and state courts properly relied on *Breard* to require (as a prerequisite to obtaining review) a showing of prejudice, such as proof that the violations impacted trial or deprived a defendant of a constitutional right. *See, e.g., U.S. v. Ortiz*, 315 F.3d 873, 878 (8th Cir. 2002); *U.S. v. Minjares-Alvarez*, 264 F.3d 980, 986-87 (10th Cir. 2001); *U.S. v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000); *U.S. v.*

Congress reinforced those procedural default rules when, subsequent to the ratification of the Treaty, it enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, Apr. 24, 1996, 110 Stat. 1214. *Breard,* 532 U.S. at 376. Under this statute, a federal habeas petitioner, claiming his incarceration violates "treaties of the United States," generally is not entitled to an evidentiary hearing where he "fail[s] to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. § 2254(a), (e)(2) (1994).

Although Petitioner is correct that treaties are the Supreme Law of the Land, so, too, is the Constitution itself, as well as an Act of Congress. *Breard,* 523 U.S. at 376. Moreover, this Court has repeatedly held "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Id.* at 376 (citing and quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)) (citing also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating when treaty and federal statute conflict, "the one last in date will control the other")).

While the Vienna Convention was adopted in 1969, Congress subsequently enacted, and the President signed, the AEDPA in 1996. A petitioner's "ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be." *Breard,* 523 U.S. at 376. No substantial, constitutional basis exists on which to alter it. *See* Sandra Day O'Connor, *Federalism of*

Cordoba-Mosquera, 212 F.3d 1194, 1196 (11th Cir. 2000); *U.S. v. Pagan*, 196 F.3d 884, 890 (7th Cir. 1999); *U.S. v. Ademaj*, 170 F.3d 58, 67-68 (1st Cir. 1999).

Free Nations, in International Law Decisions in National Courts 13, 19 (Thomas M. Franck & Gregory H. Fox eds., 1996) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (stating that "the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question") (noting "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power. . . .'")).

Thus, the United States Constitution and Acts of Congress (as interpreted by decisions of this Supreme Court and enacted subsequent to the ratification of the Vienna Convention) have Supremacy over the contrary decisions of the ICJ (creating judicially enforceable rights without regard to procedural default rules).

Because Petitioner Bustillo's Vienna Convention claim was procedurally defaulted under a state statute and not the AEDPA, however, he contends that ICJ's version of the Treaty is the Supreme Law of the Land. (Pet'r. Br. Bustillo at 16-20, 29-31, 45). Bustillo, therefore, argues that under the Supremacy Clause, the ICJ's version of the Treaty must prevail over state procedural default rules (barring claims if not first raised in state trial court). *Id.* at 16-20, 29-31, 45. Bustillo's proposed resolution therefore, creates an irreconcilable conflict with the existing Federal AEDPA statute and the well established constitutional doctrine of criminal procedure concerning procedural default.[6]

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[6] Bustillo's position lacks merit. Although the ICJ judgments come later in time than the AEDPA, such decisions do not constitute a superseding subsequent enactment since they merely involve the review by an international tribunal of a prior enactment. Moreover, while the Supremacy Clause may include treaties, it nowhere encompasses a mere

Petitioners' briefs either fail to address this problem or dismiss it as irrelevant. See, e.g., Pet'r Br. Bustillo at 45.

Following Petitioners' proposed course would improperly allow views of an international court, lacking entitlement to recognition, to prevail over those of our own citizens. Any decision by this Court concerning the continued constitutional efficacy of state procedural default rules should, therefore, consider how the rule of decision rendered will affect similar procedural default rules in future *federal* habeas cases.

We also note that implementing the ICJ version of the Treaty unfairly gives charged foreign nationals more rights than charged American citizens on habeas. Indeed, under the ICJ version of the Treaty, nothing prevents a charged foreign national from strategically holding back any Vienna Convention claim until after trial (with or without the effective assistance of competent counsel).

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opinion by the ICJ, since such an opinion is not a *treaty*. U.S. Const. art. VI, cl.2.

C. DEFERRING TO THE ICJ DECISIONS FOR THE RULE OF DECISION IN THIS CASE SURRENDERS AMERICAN SOVEREIGNTY AND HAS POTENTIAL TO CREATE A CONSTITUTIONAL CRISIS OF EPIC PROPORTIONS.

The American people trust their courts to faithfully interpret the expression of the popular American will and resolve their disputes fairly under the rule of law. It is this trust of the people, standing alone, that gives legitimacy to a federal court's power of judicial review. Thus, in a constitutional republic dividing power between an elected executive, an elected legislature, and an independent judiciary, the continued legitimacy of democratic institutions rests in part on the unelected judiciary not usurping the power of politically accountable branches of government.

In this regard, the facts of this case create the potential for a constitutional crisis of epic proportions. Here, Petitioners ask an unelected Supreme Court to reject well-established American constitutional and statutory law as the rule of decision in this case. In its place, Petitioners suggest that this Court deem as the Supreme Law of this Land, an unelected foreign court's judicial promulgation. Such a course surrenders the sovereignty of the United States to the International Court of Justice and interferes with the right of politically accountable branches to govern under the rule of law.

Nowhere in the history of our nation has a court of justice attempted to assume so much power in American government as the ICJ did in the *La Grand* and *Avena* judgments. When this Court decides whether to rely on the judgments of the ICJ here, *amicus* asks this Court to consider that no politically accountable President appointed anyone on that tribunal. Likewise, no politically accountable Senator voted to confirm anyone on that tribunal. By asking this

Court to authoritatively use the ICJ judgments in interpreting the Treaty in the instant case, Petitioners seek to legitimize it as the rule of decision for American courts. This approach, however, extra-constitutionally allows an international body to shape law binding the American people. In this regard, Petitioners ask this Court to do nothing less than to surrender American sovereignty.

The use of foreign authorities strikes at the founding bargain made by the American people. The American people at no time subordinated themselves to an international sovereign on domestic issues and have fought wars to avoid being subordinated to European or foreign authorities.

Petitioners cite to the Federalist Papers, and other constitutional history, to justify their desire for this Court to rely upon the ICJ judgments creating individual rights judicially enforceable in American courts. *See* Pet. Br. Bustillo at 16-17; Sanchez-Llamas at 35-36. Reliance on foreign precedents, however, actually conflicts with the structure and history of the U.S. Constitution.

James Madison expressed his wonder at the considerable extent to which the Philadelphia Convention reached agreement on the Constitution with these words: "It is impossible for the man of pious reflection not to perceive in it, a finger of that Almighty hand which has been so frequently and signally extended to our belief in the critical stages of the revolution." *The Federalist* No. 37 at 236-238 (James Madison) (J.E. Cooke ed., 1961). Indeed, the adoption of the Constitution signified the people's acceptance of a moral view of government. The natural sovereign authority the Constitution affords to these United States, as a part of that moral view, should not be disturbed.

Indeed, the Constitution gives no indication that the people intended under these truths to grant ultimate power to those who would divine law from the statements of non-representative international bodies. The people ceded only those natural rights which any people must cede so as to vest a necessary government with adequate powers. *The Federalist* No. 2, at 8 (John Jay) (J.E. Cooke ed., 1961). The Founders further recognized those powers were limited by "the transcendent law of nature and of nature's God . . . to which all such institutions must be sacrificed," *The Federalist* No. 43, at 297 (James Madison) (J.E. Cooke ed., 1961).

Thus, it is apparent throughout *The Federalist* that the United States Constitution was written with a particular view in mind of ordinary principles of causality – that certain motives and opportunities of constituent interests ought (in view of the nature of man) to be treated by certain forms of government. The judicial submission of the American people to an international rule of decision, to which neither political branch has on its own submitted, is not part of those Constitutional principles.

The perils of the judiciary submitting the United States to the authority of international norms which the political branches have not adopted or authorized are many and well-documented. World judicial systems are immensely varied, creating "promiscuous opportunity" to cite authority for whatever propositions the courts wish. Richard Posner, *No Thanks, We Already Have Our Own Laws,* Aug. 2004 Legal Affairs 40, 41; John Leo, *Creeping Transnationalism*, U.S. News & World Report, July 21, 2003, at 58 (observing a problem with judges defying American law by spotting "emerging world consensus"); Donald E. Childress, III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 Duke L.J. 193, 217, 219-220 (2003)

(proposing that international comparative analysis overturns American legal culture and constitutionalism).

Citation of foreign decisions becomes "one more form of judicial fig-leafing" of which we have too much already, when the real influences on judicial decision-making have nothing whatever to do with the study of foreign decisions. Posner, *supra,* at 42. Indeed, foreign decisions "emerge from a complex socio-historical-politico-institutional background" of which federal judges "are almost entirely ignorant." *Id.* Courts are not all pursuing the same enterprise. A federal court interpreting the United States Constitution may not be doing anything like that which a foreign court does interpreting different documents. *See* Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 Am. J. Int'l L. 69, 73 (2004) (noting that this practice threatens to undermine constitutional law).[7] American constitutional law and international human rights law emerge from distinctly different source material. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 Va. J. Int'l L. 913, 919 (2004).

For instance, relying on foreign authority to declare new fundamental constitutional rights shatters prior prudential constraints on substantive due process theories. *Id.* at 925 (citing Robert C. Post, *Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L.

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[7] Professor Ramsey gives the example that the *Dudgeon* European court which this Court cited in *Lawrence v. Texas*, 539 U.S. 558 (2003), was deciding whether an anti-sodomy provision was "necessary" within the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, whereas this Court in *Lawrence* was deciding whether Texas's anti-sodomy law was "reasonable" under the Constitution. Ramsey, supra. at 73-74.

Rev. 4, 96 (2003)). This Court has clearly, and repeatedly, held that treaties cannot supersede individual rights protected under the United States Constitution. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (upholding First Amendment freedoms); *Reid v. Covert*, 354 U.S. 1 (1957) (upholding Sixth Amendment rights). If this Court cedes part of the Constitution in the instant case, it might expect new petitioners before this Court citing international norms to stifle free expression of religious views, and the free exercise of religion in general.

Citation of foreign decisions certainly is counter to popular rule by the people and undemocratic. Posner, *supra* at 42; Roger P. Alford, *Misusing International Sources to Interpret the Constitution,* 98 Am. J. Int'l L. 57 (2004). In fact, citation of foreign decisions is often an express strategy of law professors and interest groups to find "a more sympathetic set of interpretive sources than existed domestically." Ramsey, *supra* at 70 (citing Harold H. Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085, 1109-1129 (2002)).

Because the Court does not have the institutional resources and skills to engage in its own comparative and empirical analysis of international sources, it relies unduly on misshapen advocacy. *See* Alford, *Misusing International Sources*, *supra* at 64-65. Selection of foreign sources then becomes non-empirical and even arbitrary except in relationship to the desired outcome.[8] Ramsey, *supra* at 72-73. Moreover, the choice of issues on which to employ comparativism is itself unprincipled and, therefore, seems directed to the Court's ends. *See* Alford, *Misusing International Sources*, *supra* at 67-68 (2004) (citing Mary

[8] Professor Ramsey queries why the Robinson brief on which this Court relied in *Lawrence* cited the law of Israel rather than India, for instance. *Id.* at 73.

Ann Glendon, *Abortion and Divorce in Western Law* 24-25, 145-54 (1987) (noting that, comparatively speaking, the United States' abortion policy is singular among all of the world's countries)). "Gone are decisions that turn on objective facts or value judgments of others. What matters is the Court's own conception of liberty."[9] Alford, *Federal Courts, supra* at 925. Enumeration of rights created by international tribunals not only abandons the Constitution's text and history but also the experience and history of the Nation. Alford, *Federal Courts, supra* at 926.

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[9] Professor Alford also mentions Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), writing of a jurisprudence "where judges . . . felt free to roam where unguided speculation might take them." Alford, *Federal Courts, supra* at 925 n.78.

CONCLUSION

By the adoption of the Constitution the American people ceded certain of their inviolable natural rights to the government. The people did not, however, cede those rights to foreign judges exercising authority inconsistent with that authorized by the people's representatives and the Constitution itself.

Here the ICJ had no authority to discern individual rights judicially enforceable in American courts. Yet, in the face of substantial contrary legal authority, the ICJ did so. This Court should, therefore, reject Petitioners' invitation to anoint the ICJ's judicial promulgation as the Supreme Law of this Land. Moreover, authoritatively adopting the ICJ judgments will create an irreconcilable conflict with existing federal statutes and well established constitutional doctrines of criminal procedure. Given that the politically accountable branches of the American government hold a very different understanding of the Treaty's terms than the ICJ, heeding Petitioner's request is an especially inappropriate course for this Court.

To impose the ICJ's interpretation on the United States subordinates and alters the United States Constitution. It deprives the Executive Branch of its right, under the U.N. Charter, to exercise discretion in choosing how to respond to a judgment of the ICJ, and deprives Congress of its constitutional authority to legislate. By denying the politically accountable branches of this Nation the ability to carry out their respective roles under the Constitution, it also surrenders the sovereignty of the United States to an unelected international body. Neither the United States Constitution, nor the natural law of nations on which it was founded, permit such an extraordinary result.

For these reasons, your *amicus curiae* urges this Court, not to authoritatively rely upon the *LaGrand* and *Avena* decisions as interpretative sources.

Respectfully submitted,

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